



SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD

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**VIA FAX, E-MAIL &
FIRST CLASS MAIL**

John H. Robertus
Executive Officer
California Regional Water Quality Control Board
San Diego Region
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ATTN: AGENDA FOR SEDIMENT CLEANUP

RE: Tentative Cleanup & Abatement Order No. R9-2005-0126 Issued by the San Diego Regional Water Quality Control Board ("RWQCB"), on April 29, 2005 ("Order")

Dear Mr. Robertus:

Reference is made herein to (1) the above-captioned Order; and (2) that certain Notice of Public Workshop Rescheduled, Notice of Public Hearing Postponed, dated May 20, 2005, and issued by the RWQCB with respect to the Order (the "Notice").

Please be advised that neither this letter nor the information contained therein constitute nor shall be construed as constituting either an admission of any wrongdoing or violation, or an acknowledgment of or agreement with any or all of the findings, statements, conclusions or other allegations set forth either in the Order or the Notice.

This letter constitutes San Diego Gas & Electric Company's ("SDG&E") written response to the Order. It is being submitted in accordance with the instructions set forth in the Notice.

The Order alleges that elevated levels of certain metal and organic pollutants above San Diego Bay background conditions exist in the San Diego Bay (the "Bay") bottom marine sediment adjacent to a number of shipyards (the "Shipyard Sediment Site"). The Order further alleges that these elevated pollutant levels adversely affect aquatic life, aquatic-dependent wildlife and human health at the Shipyard Sediment Site. Finally, the Order directs the dischargers¹ to take all corrective actions necessary to cleanup the contaminated sediment to certain quality levels.

SDG&E hereby objects to the Order on the basis of the following:

The Order fails to identify SDG&E as a discharger that contributed to the contamination, in accordance with the requirements in California Water Code ("CWC") Section 13304.

In Section 8 (pages 5-6 of the Order), the Order identifies SDG&E as a discharger of pollutants, because SDG&E owned and operated a power plant which took in and discharged cooling water into the Bay, as well as operated wastewater holding ponds. The Order, however, fails to take the second step, in accordance with CWC Section 13304, of showing or stating that these SDG&E discharges caused or contributed to the sediment contamination at the Shipyard Sediment Site. Unlike the other dischargers named in the Order, SDG&E was not identified by the RWQCB as a discharger whose discharges "*contributed to the accumulation of pollutants in the marine sediments at the Shipyard Sediment Site to levels which cause, and threaten to cause, conditions of pollution, contamination, and nuisance . . .*" See Section 8 on pages 5 and 6 of the Order, and compare it with Sections 2, 3, 4, 5, 6, 7, and 9.

Furthermore, the RWQCB has not provided any evidence or factual proof on the basis of which it identified SDG&E and the other dischargers in the Order. The RWQCB has failed to issue any kind of staff report containing the necessary analyses, assessment and other evaluative data on the basis of which it could identify the dischargers it named in the Order. The Order itself provides very little meaningful technical information with respect to at least some of the dischargers and exactly how they may have contributed to the contamination at the Shipyard Sediment Site. In fact, the RWQCB states in Section 11 on page 7 of the Order, that its findings and conclusion are based solely on "the data and other technical information contained in the report prepared by NASSCO's and Southwest Marine's consultant, Exponent entitled *NASSCO and Southwest Marine Detailed Sediment Investigation, September 2003*."

The Exponent report, however, arrived at conclusions that were vastly different than what the RWQCB states in the Order. In particular, the Exponent report documented a large area of metal and organic contamination of surface sediments with concentration gradients indicating a source other than SDG&E. Moreover, the Exponent report also noted that most of the metals found in the sediments close to where SDG&E's former facility were in the form of slag which is used as an abrasive blasting material – a process as well as a waste product that are not consistent with the operations at SDG&E's former power plant facility.

Finally, it appears that when identifying dischargers for the order, the RWQCB may have followed the less stringent standard set forth in CWC Section 13267 which provides that the RWQCB may identify any person suspected of having discharged waste which could affect the quality of waters in the state. This is confirmed in Section 35 (Legal and Regulatory Authority) on page 26 of the Order, wherein the RWQCB cites precisely Section 13267 as providing the legal basis for the Order, while failing to cite at

¹ The dischargers named in the Order are: NASSCO; Southwest Marine, Inc.; City of San Diego; Marine Construction & Design Company, and Campbell Industries, Inc.; Chevron; BP; SDG&E; and the US Navy.

all CWC Section 13304. While the standard in Section 13267 is appropriate for identifying dischargers when issuing an investigative order, it is not appropriate for identifying dischargers when issuing a cleanup and abatement order.

Therefore, the RWQCB failed to satisfy the requirements of CWC Section 13304 when it failed to show that SDG&E contributed to the sediment contamination at the Shipyard Sediment Site.

The Order is issued on the basis of incorrect and faulty factual assumptions.

To begin with, in Section 8 of the Order, the RWQCB alleges that SDG&E owned and operated its Silvergate [sic] Power Plant from 1943 to the 1990s. This is incorrect. SDG&E once owned and operated the Silver Gate Power Plant on Sampson Street (700 feet inland from the bay), from 1943 up to 1984 when it was decommissioned (the "Plant"). The Plant is on land that SDG&E owns in fee. The Plant has not been operated for 20 years. SDG&E had earlier pointed this factual error to the RWQCB in its March 3, 2004, written response to the RWQCB's Investigation Order No. R9-2004-0026, issued on February 19, 2004, but this factual correction was ignored by the RWQCB when it issued the Order.

Second, in Section 11 on page 7 of the Order, it is stated that the RWQCB's findings and conclusion are based solely on the data and other technical information contained in the Exponent report. This statement is also not true. The Order refers to data and other technical information that are not contained in the Exponent report. For instance, the Order presents a "Summary of Economic Feasibility Evaluation" in Section 33 (page 23) that appears to be based on engineering calculations by NOAA, presented in the following documents.

1. Memorandum from NOAA to Regional Board, dated February 23, 2005. Re: Calculation of Dredging Volumes at the NASSCO and Southwest Marine Shipyards for Alternative Remedial Scenarios.
2. Memorandum from NOAA to Regional Board, dated March 14, 2005. Addendum to Memorandum dated February 23, 2005, Re: Calculation of Dredging Volumes at the NASSCO and Southwest Marine Shipyards for Alternative Remedial Scenarios.
3. Memorandum from NOAA to Regional Board, dated April 12, 2005. Re: Calculation of post-dredging area weighted averages at the NASSCO and Southwest Marine Shipyards for Alternative Remedial Scenarios.
4. Memorandum from NOAA to Regional Board, dated May 12, 2005. Re: Calculations of Dredging Volumes at the NASSCO and Southwest Marine Shipyards for Five Times Baseline Remedial Scenario Using TBT, PCB and Benzo(a)pyrene (BAP).

Third, while the Order correctly states that PCBs had been detected in SDG&E's wastewater holding ponds, the RWQCB, however, incorrectly states that, therefore, SDG&E is the source of PCBs in the Shipyard Sediments Site. There is no evidence given to show that these ponds had leaked and released PCBs into the Bay. On the contrary, there is significant evidence and data in the Exponent report and others, showing that the PCBs detected in the Shipyard Sediment Site originated elsewhere other than SDG&E's power plant facility. In fact, there are historic records (including photographs) showing that shipyard operations were being conducted on and around SDG&E's open ponds – operations which included ship repair. It is also generally accepted that PCBs are ubiquitous in the shipbuilding industry, particularly in older vessels where PCBs can be found in "... rubber products such as hoses, plastic foam insulation, cables, silver paint, habitability paint, felt under septum plates, plates on top of the hull bottom, and primary paint on hull steel." (OSHA Fact Sheet "Shipbreaking," 2001.) More likely than not, PCBs from the ship building and repair operations were deposited in SDG&E's ponds as well as in the Bay. The RWQCB's contention that the PCBs in the ponds were the source of the PCBs in the Bay is,

therefore, is as anomalous and faulty a proposition as arguing that a child gave its parent a cold, or vice versa, when both individuals were exposed to the same cold virus at the same time.

The Order violates the requirements and policies set forth in the CWC and in State Water Resources Control Board's Resolution No. 92-49 ("92-49").

CWC Section 13360 prohibits the RWQCB from specifying the method the dischargers may use to comply with the Order, as well as requires the RWQCB to allow the dischargers to propose lawful methods for achieving compliance. The Order, however, violates CWC Section 13360 when it arbitrarily presents the dischargers with only one method for achieving compliance, namely, dredging. See Section 32 on page 23 of the Order.

The Order, furthermore, fails to comply with the RWQCB's own policies set forth in 92-49 which requires, among other things, that the RWQCB make a "reasonable effort" to identify the dischargers that contributed to the contamination. As discussed above, the RWQCB failed to show that SDG&E's discharges had contributed to the sediment contamination at the Shipyard Sediment Site. The RWQCB also utilized the less stringent standard of CWC Section 13267 which allows identifying discharges solely on the basis of suspicion, instead of proof. Therefore, with respect to naming SDG&E a discharger, the RWQCB failed to comply with 92-49. Furthermore, with respect to naming the other dischargers, the RWQCB also shows its failure at making a "reasonable effort" at doing this when it issues the Order without concurrently issuing the staff report containing the evidentiary bases upon which each of the dischargers are identified. Consequently, without the staff report, the RWQCB is unable to show that it complied with the first requirement of 92-49, which is to use "evidence" when naming dischargers in a cleanup and abatement order pursuant to CWC section 13304.

Finally, 92-49 requires the RWQCB to allow the dischargers to propose and select possible corrective actions, from the perspective of feasibility and cost-effectiveness. The Order, however, violates this requirement, because the Order immediately directs the dischargers, 90 days after adoption of the Order, to submit a remedial action plan (not a feasibility study or remedial investigation report), and to implement that remedial action plan 60 days after submittal. See *Order Directives A, B, C and D*, on pages 27 to 30 of the Order. Indeed, the first paragraph of the *Order Directives* section states that these directives are being ordered pursuant to both CWC Sections 13304 and 13267, the latter pertaining to the investigation and assessment of the contamination, which is not even listed in this Section.

In conclusion, SDG&E hereby submits that the RWQCB should remove SDG&E from the list of dischargers before it issues the Order in final form:

1. The findings and conclusions set forth in the Order are not legally sufficient to support or justify the RWQCB's decision to name SDG&E a discharger contributing to the contamination at the Shipyard Sediment Site.
2. Not only does the RWQCB fail to provide evidence proving that SDG&E contributed to the contamination at the Shipyard Sediment Site, but the Order itself also avoids stating conclusively that SDG&E's discharges contributed to the Shipyard Sediment Site.
3. The Order itself contains a number of factual inaccuracies and errors, which are not only easy to prove as errors, but also may prove to be the "Achilles Heel" of the Order if and when it is finalized and subsequently challenged in court.

4. Moreover, the RWQCB itself failed to comply with its own internal policies when it issued the Order without exercising "reasonable effort" or providing "evidence" in identifying the dischargers, as required by its very own Resolution 92-49.
5. Finally, the RWQCB not only violated Resolution 92-49, but it also violated CWC Section 13360, both of which prohibit the RWQCB from specifying the corrective methods for dischargers to use to comply with the Order, when the RWQCB presented only one method for achieving compliance with the Order, namely, dredging.

Fortunately, removing SDG&E from the list of dischargers will not have the collateral effect of not having enough dischargers with the resources sufficient to address and conduct the corrective actions set forth in the Order. In fact, the two shipyards named in the Order possess sufficient resources to address and remediate the contamination in the Shipyard Sediment Site.

SDG&E reserves its right to supplement or modify this letter and the information contained therein, to the extent it deems necessary. Thank you very much for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read 'V. Gonzales', with a long, sweeping horizontal line extending to the right.

Vincent M. Gonzales